

Is Article 7 Really the EU's "Nuclear Option"?

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In a rather prescient State of the Union address given in September 2013, the former President of the European Commission, Mr José Manuel Barroso, highlighted the increasing “challenges to the rule of law in our own member states” in the context of which he referred to Article 7 of the Treaty on European Union as the EU’s “nuclear option”. When doing so, however, he only mentioned the suspension of a Member State’s rights. This proved to be a rather unhelpful label as it undermined the dissuasive nature of Article 7 and furthermore led to a widespread belief that Article 7 only involved excluding the Member State from participation in union decision-making. As previously noted, this is however not correct because this provision also contains a preventive mechanism provided for in Article 7(1) which can hardly be described as “nuclear”. It merely consists of enabling the Council to formally recognise the existence of a risk of serious breach and adopt recommendations to address the situation.

Frans Timmermans was therefore correct to point out that the preventive mechanism, which was activated for the first time against Poland last December, is “not a nuclear option”. Indeed, by activating Article 7(1), the Commission is merely asking the Council and the European Parliament to decide whether there is a clear risk of a serious breach of the rule of law, in which case “they can then also send recommendations to the Polish government, and then take it from there. So it’s not a nuclear option. It’s again an attempt to start a dialogue to resolve the situation.” Rather, the Commission’s (reluctant) decision to initiate Article 7(1) reflects the failure of the Commission’s previous attempts to engage in a dialogue with the Polish government within the framework of the so-called pre-Article 7 procedure.

Of course, there is a second mechanism within Article 7 provided in Articles 7(2) and (3). Under Article 7(2), a unanimous European Council plus two-thirds of the Parliament may determine that there has, in fact, “a serious and persistent breach by a Member State of the values referred to in Article 2...” If such a determination is made, then under Article 7(3), sanctions may be levied that “suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.” This is the part of Article 7 that causes commentators to infer that any application of Article 7 is necessarily nuclear. They forget that Article 7(1) provides a very different avenue for engagement with a wayward Member State, an avenue that involves warning, dialogue and recommendations, not sanctions.

So far, in the case the Commission’s recommendation to the Council on Poland and in the case of the European Parliament’s resolution on Hungary, the immediate practical question only involves Article 7(1), which is clearly non-nuclear. The question before European bodies now is therefore only whether they will issue a warning to the governments of Poland and Hungary that they have entered authoritarian territory. Failure to do so sends a

dangerous signal that the actions of the Polish and Hungarian governments in compromising the independence of their judiciaries, muzzling their media, attacking the civil sector and interfering politically with the professional civil service does not pose a cause for concern on the part of the other Member States. Talk of a nuclear option at this point is unhelpful because that is not the option on the table at the moment.

But some sceptics seem to believe that European institutions should not invoke Article 7(1) unless they can see a path to invoking Article 7(2) and (3) if the warning stage does not succeed. Given the unanimity required of Article 7(2) and the mutual promises that Poland will vote against sanctions for Hungary and vice versa, it appears to many that a persistent and serious breach can never be determined under Article 7(2). This leads some to believe that there is therefore no point in triggering Article 7(1) (there may however be ways around the fellow-traveller veto: see this proposal). But this misunderstands the structure of Article 7. It is not necessarily the case that Article 7's different parts move in lockstep from one stage to another.

The relationship among the parts of Article 7 may look like a progression from a warning to a determination of a breach to sanctions. It can in fact be used that way. But there is more flexibility in the relationship among the parts of Article 7 than this and not just because the sanctioning mechanism involves unanimity at the choke point before sanctions can be levied. For example, there is no requirement that expressed concern about a Member State must start with Article 7(1). The Commission could well have started with Article 7(2) and ask the European Council to decide whether a serious and persistent breach of the rule of law has already occurred in Poland. As we have argued before, in Hungary, the government has dismantled checks on the power of the prime minister and destroyed the independence of virtually all checking institutions, including the judiciary, over eight long years, which to us more than meets the standards of a serious and persistent breach. Given Hungary's track record, the Commission (or for that matter, one third of the Member States) could start theoretically with Article 7(2).

Similarly, EU institutions might warn a Member State under Article 7(1) and hope that invocation of the later parts of that Article may not be necessary. Even if the Member State fails to take the advice of the other Member States under Article 7(1), there may be other options open to the Commission to carry forward the attempt to get the Member States in question to comply outside the framework of Article 7. For example, the Commission could bring more systemic infringement actions or EU institutions could condition the continued flow of EU cohesion funds to a wayward state dependent on compliance with Article 2 values. The reactions of a Member State to an Article 7(1) dialogue and accompanying recommendations may provide important input into the determination of whether these other sanctioning mechanisms should be used.

Article 7 is one important tool in the mix for EU institutions to use, but it is a set of resources that are not necessarily linked as rigid stages from warning all the way through to suspension of some or all of the privileges of Member States. Moreover, it can be used as one element in a mix of other sanctioning mechanisms outside the framework of Article 7. Article 7 may become potentially very powerful by excluding a Member State from participation in Union decision-making, but it can be used in various ways and alongside other strategies to bring a Member State into compliance with EU values, which is the

ultimate goal.

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